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No. 74-1245

Supreme Court of the United States

October Term 1975

LIBERTY MUTUAL INSURANCE CO., INC.,
Petitioner,

v.

SANDRA WETZEL, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND INTERNATIONAL UNION UAW AS AMICI CURIAE

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND INTERNATIONAL UNION UAW AS AMICI CURIAE

This brief *amici curiae* is filed in support of the position of the respondents by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the International Union UAW with the consent of the parties as provided for in Rule 42 of the Rules of this Court.

INTEREST OF THE AMICI CURIAE

The AFL-CIO is a federation of 111 national and international labor organizations, having a total membership of

approximately 14 million. As such it is the majority spokesman for the trade union movement. The International Union UAW is the largest independent industrial union in this country, having a membership of approximately 1,500,000. Women comprise a substantial portion of the membership of both organizations.

All of the women members of the *amici curiae* who are of child-bearing age are directly affected by the issues in this case. Unless the decision below is affirmed they may become disabled from work by pregnancy and nonetheless be without income protection during the period of such disability. Thus one of the first priorities of the AFL-CIO and its affiliates and of the UAW has been reform of the features of the income disability programs that discriminate against women during pregnancy. It is for this reason that the *amici curiae* have determined to take this opportunity to present their views to this court.

ARGUMENT

The only issue before the Court in this case is whether a private employer may exclude from a broad income protection program, funded in large part by the employer, disabilities which in their medical effect upon an employee's ability to work are indistinguishable from the disabilities covered by the plan but which are due to pregnancy or complications resulting directly from pregnancy. The suit was brought under Title VII of the Civil Rights Act of 1964, which makes illegal certain employment practices Congress determined impeded equal opportunity on the basis of factors which in fairness ought not be considered by employers in making decisions regarding their employees. The accepted canons of statutory construction establish that the

employment practice challenged in this case is to be judged solely against the language, structure, and intent of the legislation under which it was brought.

We believe that the respondents and various of the *amici curiae* supporting their position have conclusively demonstrated in their briefs that it was indeed Congress' intent in proscribing discrimination based on sex to ban pregnancy-based distinctions as well. In particular, Congress' recent acceptance of the regulations issued by the Department of Health, Education, and Welfare under Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681 *et seq.*), see 45 C.F.R. § 86.57, 40 Fed. Reg. 24144 (June 4, 1975), which track the Equal Employment Opportunity Commission's Guidelines on pregnancy distinctions in disability programs and other employment practices (29 C.F.R. § 1604. 10(b)), is a compelling indication of Congress' understanding of what constitutes discrimination based on sex.

Liberty Mutual has chosen largely to rest its case not on statutory analysis but upon this Court's decision in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), which, while involving a similar exclusion from a somewhat similar program for maintenance of income during the periods an employee is medically precluded from working,[1] was determined without reference to Title VII. We believe, for the reasons detailed below, that *Geduldig* is entirely irrelevant to this

[1] The disability program in this case does differ in several significant respects from the program considered in *Geduldig*. Aside from the obvious difference—that Liberty Mutual's program is a private, employment-related plan rather than a legislative social welfare program—the Company's program excludes all pregnancy-related disabilities, rather than only those involved in a normal pregnancy. While petitioner represents that the pregnancy exclu-

case, and that this Court has already charted the course which must be followed in analyzing the impact of Title VII upon the sort of employment classification practiced by the petitioner. Applying these principles, we believe it clear that Liberty Mutual's exclusion of pregnancy-related disabilities from a broad income protection plan cannot stand.

I. SINCE TITLE VII PROSCRIBES A CLASSIFICATION SUCH AS THE PREGNANCY EXCLUSION IN THIS CASE WHICH, WHILE CAST IN NEUTRAL TERMS, ADVERSELY AFFECTS AS EMPLOYEES A SUBGROUP WHICH IS ENTIRELY COMPOSED OF ONE GENDER WITHOUT A SHOWING OF BUSINESS NECESSITY, *Geduldig* v. *Aiello*, 417 U.S. 848 (1974), HAS NO RELEVANCE TO THIS CASE.

In *Geduldig* the Court held valid under the Equal Protection Clause of the Fourteenth Amendment a state disability program which excluded from coverage disabilities due to normal pregnancy and delivery. Noting that the State had several legitimate reasons for declining to incur the relatively large additional costs involved in covering disabilities relating to normal childbirth, the Court deemed "rationally supportable" (*id.* at 495), the "state's decision not to create a more comprehensive insurance program than it has" (*id.* at 496).[2]

sion in its disability plan is construed so as to parallel the breadth of the exclusion in *Geduldig*, this is clearly not so. For example, complications such as ectopic pregnancy and Caesarean section delivery arise "wholly and solely from pregnancy." (Pet. Br. p. at 6 n. 26), but were included in the amended disability program in *Geduldig*. (See 414 U.S. 484, 490-91, n. 15; see also p. 10 *infra*.)

[2] These reasons included "maintaining the self-supporting nature of its insurance program • • • ", "distributing the available resources in such a way as to keep benefit payments at an adequate level for disabilities that are covered • • • ", and "maintaining the contribution rate at a level that will not unduly burden participating employees • • •." (*Id.* at 496.)

Had the Court said no more, *Geduldig* would clearly have little pertinence to this case, which was brought not under the Equal Protection Clause but under a statute prohibiting certain sorts of discrimination by employer *vis a vis* their employees. Petitioners do not appear to dispute the obvious proposition that Congress *could* choose to ban private employers from providing broad disability programs but excluding pregnancy-related disabilities which have precisely the same income-diminishing results, even if such exclusions would not, when practiced by a state, constitute a denial of equal protection. (Cf. *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964)). Thus, as the Court of Appeals said "our case is one of statutory interpretation [of Title VII] rather than of constitutional analysis." (511 F.2d 199, 203.)

Liberty Mutual, however, argues that in one respect *Geduldig* has entirely changed the complexion of this case. Relying heavily upon footnote 20 of *Geduldig* (417 U.S. at 496), petitioner maintains that Title VII can have no application to this pregnancy exclusion, because the classification involved is not based on "gender as such" (*id.*).[3]

But Title VII does not proscribe merely discriminations

[3] At the same time, Liberty Mutual appears to concede that *other* exclusions based on pregnancy would come within the purview of Title VII. (Pet. Br. p. 21, n. 39.) Indeed, several employment policies of Liberty Mutual based on differential treatment of pregnant women as opposed to "non-pregnant persons," *Geduldig* v. *Aiello*, 417 U.S. 484, 496, n. 20, were declared invalid under Title VII by the district court and the court of appeals, App. 153-158, 511 F.2d 199, 207-08, but petitioner did not seek certiorari

based on "gender as such." While subsection (1) of § 703 (a) of the Act (42 U.S.C. § 2000e-2(a)), proscribes discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's • • • sex," subsection (2) makes it illegal "to limit, segregate or classify • • • employees • • • *in any way* which would deprive or *tend to deprive* any individual of employment opportunities or *otherwise adversely affect his status as an employee,* because of such individual's • • • sex." (Emphasis supplied.) As the division of § 703 (a) into two subsections and the careful language of subsection (2) indicates, Congress clearly intended in subsection (2) to ban not only distinctions which are patently drawn along discriminatory lines, but also those which, while premised upon apparently neutral criteria and developed without an animus against one group or another, have the *effect,* without sufficient justification, of disadvantaging a protected group or a significant portion thereof. This is the teaching of *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 431-32 (1971) where the Court noted:

> "[T]he Act proscribes not only overt discrimination but also practices that are fair in form but discriminatory in operation. • • • [G]ood intent or absence of discriminatory intent does not redeem employment [policies] that operate as 'built-in headwinds' for [protected] groups."[4]

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on the validity of those practices. We show below, pp. 12-15, *infra*, that the exclusion of pregnancy from disability benefits is, for all purposes relevant to Title VII, indistinguishable from the other pregnancy exclusions which, as petitioner concedes, *are* barred by the statute.

[4] In *Griggs*, the Court relied only on subsection (2) of § 703 (a) of the Act. (401 U.S. at 426, n. 1.)

To adopt petitioner's view of Title VII as relating only to "gender as such" distinctions is to ignore the thrust of *Griggs* as well as of *Phillips* v. *Martin Marietta Co.,* 400 U.S. 549 (1971). In both instances, the employment practice found invalid did not distinguish in terms between employees of different races or sexes. In *Griggs,* the line was between employees, black and white, who passed the employer's tests and fulfilled the educational requirements and those, black and white, who did not. Similarly, the invalid classification in *Phillips* divided employees into two groups: mothers, who were all women, and non-mothers, who were of both sexes. And, the practice in *Martin Marietta* not only was neutral on its face but, on a group basis; seems to have operated so as not to exclude women "as such," since 75-80% of those hired were women.[5]

After *Griggs* and *Martin Marietta* were decided, Con-

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[5] Similarly, *Sprogis* v. *United Air Lines,* 444 F.2d 1194 (7th Cir. 1971) involved a challenge under Title VII to a policy which discriminated not against all women but against a sub-group of women—those who were married. The court said that Title VII's reach:

> "is not confined to explicit discriminations based 'solely' on sex. In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women • • • The effect of the statute is not to be diluted because discrimination adversely affects only a portion of the protected class. Discrimination is not to be tolerated under the guise of physical properties possessed by one sex • • • or through the unequal application of a seemingly neutral company policy. Cf. Phillips v. Martin Marietta Corp., 400 U.S. 542, 91 S.Ct. 496, 27 L.Ed.2d 613." (*Id.* at 1198.)

As the *Sprogis* court went on to note, *id.* at 1198 n. 4:

> "Congress specifically rejected an amendment to the Act which would have • • • limited the force of the prohibition

gress had the opportunity in 1972 to limit subsection (2) if it so desired to require that a proscribed classification must be one which divides employees or potential employees into subgroups entirely distinct racially or sexually. Instead, Congress expanded § 703 (a)(2) while expressly endorsing *Martin Marietta* and, at the same time, rejected any interpretation which would limit *Griggs* to racial impact cases.

Thus, § 703 (a)(2) was amended in 1972 to make clear that it applies not only to employees but to applicants for employment. (Pub.L. 92-961, § 8(a) (1972).) While that amendment does not have direct relevance to this case, Congress, in adopting the amendment, did indicate its understanding that subsection (2) had and should continue to have precisely the thrust we have ascribed to it. Senator Williams, the floor manager of the bill, introduced to accompany the Conference Report a section-by-section analysis which stated that the purpose of the amendment to § 703 (a)(2) is

> "to make it clear that discrimination against applicants for employment • • • is an unlawful employment practice. This subsection is merely declarative of present law as contained in the decision in *Phillips* v. *Martin-Marietta Corp.*, 400 U.S. 549 (1971) • • •." (118 Cong. Rec. 7168 (1972).)

Since § 703(a)(1) applies in terms to failure to hire, Congress obviously intended § 703(a)(2) to continue as a separate prohibition directed at the sort of non-inclusive discrimination practiced in *Martin Marietta*. The only other remotely possible construction of § 703(a)(2)—that it ap-

against sex discrimination [by limiting Title VII to discrimination based 'solely' on gender.] Such a limitation, it was felt, would emasculate the Act. See 110 Cong. Rec. 2728, 13,825."

plies exclusively to situations such as segregated seniority lines of progression—was not Congress' understanding of the subsection, since *Martin Marietta* involved no such problem, and since such classifications have no effect upon "applicants for employment" until they are hired and become "employees."

Further, Congress in 1972 decisively rejected any implication from the brief consideration given the sex discrimination provision in 1964 that classifications which disadvantage many women but no men are to be treated differently from classifications with a similar impact upon a racial group. The Report of the House Labor Committee on the 1972 Amendments said:

> "Despite the efforts of the courts and the [Equal Employment Opportunity] Commission, discrimination against women continues to be widespread, and is regarded by many as either morally or physiologically justifiable.
>
> "This Committee believes that women's rights are not judicial divertissements. Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination." (H. Rep. No. 92-238, 92nd Cong. 1st Sess., p. 5 (1971).)

Thus, *Griggs* must apply with full force to a distinction which has the effect of disadvantaging the status as employees of a large number of women but has no such impact on any man. Indeed, this case involves a distinction more clearly linked to a proscribed classification than that in *Griggs* since, like *Martin Marietta*, it involves a subgroup which is by definition composed entirely of women. While it is true that, as petitioner says in distinguishing

Martin Marietta, this case does not involve "one hiring policy for women and another for men" (*Martin Marietta*, 400 U.S. at 544, quoted at Pet. Br. p. 9), Title VII, and specifically § 703 (a) (2) thereof, is not limited to failure to hire or to *exclusion* from employment opportunities; the Act also bars practices which "*tend* to deprive any individual of employment opportunities or • • • adversely affect his *status as an employee*." (Emphasis supplied.) Thus, once it is established that a practice operates to disadvantage a subgroup composed *entirely* of members of a protected class, even if it is not composed of *all* members of that class, the questions become whether the prohibited effect has been demonstrated, and whether a "business necessity" (*Griggs*, 401 U.S. at 431), has been shown in defense.

Geduldig is of little aid in answering these questions. That case involved a "social welfare" program (417 U.S. at 495) developed by the state with certain limited objectives in mind. (See n. 1, *supra*.) In contrast to the legislative objectives the Court recognized in *Geduldig*, Liberty Mutual's disability program is not self-supporting; the Company pays a significant proportion of the cost of the program. (511 F.2d at 203; App. 91, 93, 95, 97, 99.) Therefore, Liberty Mutual cannot, as it does not, rely upon the interest in maintaining a self-supporting, low-cost insurance program, the interest which the Court found to be of overriding importance in *Geduldig*. Further, benefits under the Company's income portection plan are directly linked to time worked for the Company; employees with more than five years of service may receive benefits not simply for 103 weeks but until age 65, and benefits under the Supplementary Salary Benefits program are for as many

weeks as an employee has completed years of service. (App. 92, 94, 96, 98.)

Thus, Liberty Mutual's program is at least in part a form of compensation for work done by employees. And, as the linkage between benefits available and years worked demonstrates, the decision by the Company to provide this form of compensation was undoubtedly influenced not by humanitarian largesse but by business decisions regarding the need to retain and keep productive employees. We show in Part II, *infra*, that by excluding pregnancy disabilities from the income protection program, petitioner is "adversely affecting [women's] status as employee[s]," since, in view of the purposes behind private employer disability programs, it is treating them as easily expendable rather than valued, career employees.

Moreover, even if the interests of Liberty Mutual *were* the same as those of the statute in *Geduldig*, the analysis under Title VII in this case would differ from the constitutional analysis in *Geduldig*. For, under *Griggs*, it would not be sufficient to defend the exclusion to show it to be "rationally supportable." (*Geduldig*, 417 U.S. at 495.) Rather, the distinction, to be maintained, must rise to the level of a "business necessity." (*Griggs*, 401 U.S. at 431.)[6] In Part III, *infra*, we demonstrate that cost *alone* can rarely if ever be a "business necessity" within the meaning of *Griggs*,

[6] Petitioner suggests that it may be sufficient, under *Jefferson* v. *Hackney*, 406 U.S. 535, 549 n. 19 (1972), to demonstrated that the pregnancy exclusion is "rationally related" to the purposes of the disability program. However, *Jefferson* involved a situation in which there were merely statistical differences in the racial composition of various classifications. Here, the disadvantaged group is by definition 100% female. While *Jefferson* indicates that a showing of statistical disparity alone is insufficient to show a discrimi-

and that at any rate this employer did not make the decision to exclude pregnancy from its disability program because of actuarial considerations.

II. THE EXCLUSION OF ALL PREGNANCY-RELATED DISABILITIES FROM A BROAD INCOME PROTECTION PLAN RELEGATES AFFECTED WOMEN AND, INDIRECTLY, ALMOST ALL WOMEN OF CHILD-BEARING AGE TO A STATUS OF LESS-VALUED, LESS-PROTECTED EMPLOYEES.

Before considering the precise effects of the pregnancy-based exclusion currently before the Court, it is useful to view this particular distinction as one among numerous employment practices, many of which were engaged in by Liberty Mutual itself in the recent past and were declared invalid by the courts below, which treat specially pregnancy and childbirth for purposes of setting employment policies, with the result that the job opportunities and career advancement prospects of women are severely hampered.[7] This survey is instructive for two reasons. First, it serves to illustrate that many of these practices are, and are conceded by petitioner to be, clearly invalid under Title VII, so that the application of the Act to pregnancy-based classifications is undisputable. Second, when the effects of these practices are considered and the interrelationship between the disability insurance exclusion and the other practices is recognized, the degree to which the classification involved directly in this case disadvantages a very large group of women is clarified.

natory effect adequate to invoke *Griggs'* "business necessity" touchstone, surely a demonstration of 100% correlation between a disadvantaging exclusion and a protected group is.

[7] Experience indicates that a company would be unlikely initially to exclude pregnancy from a disability insurance program if it did not have other policies singling out pregnant women for special, disadvantaging treatment. Liberty Mutual's current policy, in which only the disability exclusion remains, is an atavism resulting from progressive changes on advice of counsel (App. 36, 38, 42-43), and from the decisions below, rather than a separate, considered decision regarding the actuarial consequences of covering pregnancy disabilities. To consider the disability exclusion in isolation, therefore, is to disregard connections necessary both for analysis of the effect on employment status and for any defense petitioner may have, see Part III, *infra*.

For example, employers have in some instances sought to exclude women generally from employment on the ground that women may become pregnant, and that the pregnancy could make continuance on the job difficult.[8] On petitioner's reasoning it would be difficult to distinguish such a policy from the exclusion in this case. If pregnancy is a sufficiently *sui generis* risk to be treated separately in a disability insurance policy, it is hard to fathom why it is not also a sufficiently special risk from the point of view of a prospective employer to merit exclusion of those most likely to incur the risk—women of child-bearing age.

Yet, it is quite apparent that such an employment policy would be a blatant violation of Title VII. To permit it would in large part wash away the sex discrimination proscription of the Act; employers could then exclude *all* women up to a certain age. Surely, Congress realized when it added sex discrimination to Title VII in 1964, and when it reiterated the seriousness of its intent in this area in 1972 (p. 9, *supra*), that any healthy woman is for many years physiologically capable of bearing children, and it proscribed discrimination based on gender nonetheless.

[8] See, e.g., *Cheatwood* v. *South Central Bell Telephone Co.*, 303 F.Supp. 754 (M.D. Ala. 1969).

Other employers have declined to hire women who were pregnant when they applied for the job.[9] Still others, including Liberty Mutual until 1970 (App. 34-35, 82, 109) have in effect fired women at some specified stage in pregnancy, permitting them to reapply for jobs later as new employees and suffering them to lose seniority privileges.[10] Obviously, these two policies are of a piece: if an employer can separate a woman once she is pregnant, even if she shows no decrease in ability to perform, it must be permitted not to hire in the first place a person who, by virtue of the company's own policies, is sure to be a short-term employee. And, if an employer may refuse to hire a woman who is pregnant, it can hardly be constrained to treat differently a woman already employed.

Yet, this Court has held that to separate a woman at some predetermined stage of pregnancy is impermissibly arbitrary, since "there are large numbers of women who are fully capable of continuing work for longer than * * * [such] regulations will allow." (*Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 646 (1974).) *LaFleur* was a Fourteenth Amendment case, and on the statutory analysis set out above it follows that such a policy would also violate § 703(a)(2) of Title VII: it would impede women who intended to continue working on the basis of a condition having no relevance to their ability to work effectively. Indeed, petitioner here appears to concede as much (see n. 3, p. 4, *supra*), and did not seek review of the holding that its similar policy was invalid.

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[9] Cf. 29 C.F.R. § 1604.10(a).

[10] See, e.g., *Satty* v. *Nashville Gas Co.*, 11 FEP Cases 1 (6th Cir., Aug. 8, 1975).

Mandatory separation provisions, particularly where, as in *Satty, supra,* and as in Liberty Mutual's former policy, loss of seniority is involved, have ramifications beyond the loss of pay for the period women are able to work but prohibited from doing so. Women dependent upon their income but intending to have children may be constrained to accept less desirable jobs which do not have mandatory pregnancy leave in order to assure continuous employment. And women may be excluded from the most responsible jobs in which continuity is essential.[11] Further, if seniority is lost, the woman's entire career could be affected: there may be no job to return to when she has recovered or, if she does return to her old position, she will have a slower advancement to higher positions, because other employees hired later will have priority.

Closer to the instant case is the situation where an employer provides for a certain number of absences with pay for days lost due to sickness but refuses to allow use of accumulated sick leave for absences due to pregnancy, childbirth, or recovery therefrom.[12] The obvious result of such a policy, and of the exclusion in this case, is to cause the women affected to lose payment of wages or a portion thereof, even though they return to work promptly upon recovery,

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[11] In addition, such policies have been one of the major causes of transiency of women in employment; transiency is one of the major justifications employers have given for paying lower wages to women. (See, e.g., Hearings on H.R. 3861 Before the Special Subcommittee on Labor, 88th Cong., 1st Sess., at 139, 194, 243, 252, 258-259; Hearings on S. 882 and S. 910 Before the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, 88th Cong., 1st Sess., p. 142, 145.)

[12] See, e.g., *Hutchison* v. *Lake Oswego School District*, 11 FEP Cases 163 (9th Cir., July 21, 1975).

and even though the effect on the employer is precisely what it would have been if any other disability had occurred—payment of funds to an absent employee and, for certain jobs, the hiring and payment of a temporary replacement.

As noted above, employers institute both sick leave and disability insurance with certain business purposes in mind, not because of a mere charitable concern with the well-being of their employees.[12] Among the purposes of providing disability insurance are: a) to remove the psychological effects of fear of loss of income when it is most needed; b) to encourage employees to receive medical attention as soon as possible, thus minimizing the severity of disabilities and assuring maximum productivity; c) to foster morale and loyalty to the company; d) to provide for maximum use by supervisors of trained employees by creating a disincentive to forcing an employee able to work to stay home. (See generally D. Allen, ***Fringe Benefits: Wages or Social Obligation***, pp. 23, 31, 33-36 (rev. ed., 1969).)

Clearly, all of these purposes apply with full force to women who are medically unable to work because of pregnancy. First, the need for assured income is if anything greater during childbirth related disabilities than during other periods an employee cannot work for physical reasons. The possibility of lost time due to physical disability is not a vague fear but a certainty during the months before labor begins.[13] And, the need for assured income during the

[12] For example General Electric, a pioneer in employee benefit programs, including disability insurance, noted in its 1957 Annual Report that the overall purpose of the benefit plans is "to attract top-quality people at all levels and encourage them to make their careers with the company." (*Id.* at 18.)

[13] One difference suggested between child-birth related and other disabilities is that the former can be planned and saved for, so that the insurance is less needed. However, many women earn so little that no amount of foresight could create an excess to cover a period without pay. In addition, other disabilities—many forms of non-emergency surgery, for example—are similarly foreseeable and could be as well provided for by months of frugality as childbirth and recovery therefrom. Finally, pregnancy itself is not necessarily foreseeable, and disabilities due to pregnancy include complications which, while the risk always exists, cannot be anticipated in any particular case.

period immediately following childbirth is heightened by the need to support the new infant during that period, and by the added cost of child-care when the woman does return to work. To assure herself of needed income, a woman intending to bear children could well choose an otherwise undesirable job providing income maintenance during pregnancy-related disabilities over a position affording better career prospects.

Second, a woman who is not covered by a disability program for the period of childbirth and recovery therefrom is likely to return to work before she is fully able to assume her former responsibilities. As a result, her performance may be impaired, with a loss of productivity which could hamper her future advancement.

Third, the exclusion of pregnancy-related disabilities is certain to make an affected woman, and indeed all women with plans to bear children, feel that they are less-valued employees, and that the employer has little regard for their careers. As a result, the desire for advancement may be impaired, and the link to the company as a long-term employer lessened.[14]

[14] Thus, the argument that the fact that many women who take pregnancy leave without pay fail to return to work justifies dis-

Finally, when the company has no responsibility for sustaining the income of a woman disabled by physiological aspects of childbirth, supervisors are encouraged to insist that she stay home, rather than accommodating the job to her condition. For example, an employer faced with the prospect of paying prolonged disability benefits to a man whose heart condition makes his stressful job impossible for him would, rationally, attempt to find a less-stressful but nonetheless productive job he can perform. If it has no such liability with regard to pregnancy-related disabilities, then in those situations in which pregnancy or complications thereof render the woman unable to perform her original job at peek efficiency,[15] the impetus will be to put her on leave rather than retain her in another capacity. Indeed, an employer who does not provide income maintenance for pregnancy-related disabilities would be much more likely to mandate the arbitrary pregnancy separation policy discussed above, pp. 14-15, *supra*, since the policy would then be cost-free to the employer.

Thus, the overall effect of the exclusion of pregnancy-related disabilities from an income protection program is, like the other special disadvantages imposed upon pregnant women, to relegate pregnant women, and women who may become pregnant, to a special, second-class status with

parate treatment of pregnancy-related disabilities (see, e.g., Brief Amicus Curiae of American Life Insurance Association and Health Insurance Association of America on Behalf of Petitioner, at 30-31) is entirely circular. If an employer excludes such women from a program designed to promote employees' loyalty to the company, it is little wonder that they do not display that loyalty.

[15] There are a few positions, for example, telephone lineman, in which the added girth of pregnancy alone could make the job difficult to perform.

regard to career advancement and continuity of employment. Petitioners' only response to this analysis seems to be that it would be anomalous to require expanding a general disability program to cover pregnancy when an employer need have no such program and can have a very limited one. (Pet. Br. pp. 23-24.) However, if an employer has no program at all for insuring income to disabled workers, he is not creating two groups of employees, some valued and protected and others, all of whom are women, unvalued and unprotected. Similarly, if an employer chooses to provide a limited program applicable only to a few major disabilities which occur without regard to sex, he is not separating out a large group of women for treatment which will impair their career advancement and continuity. Petitioner's argument, therefore, misses the entire thrust of § 703(a)(2), which is to prevent *discriminatory* impact on certain groups which tends to hamper their career opportunities *vis a vis* other classes of employees. Since this exclusion has such an impact upon a group exclusively female, it violates § 703 (a)(2), unless an overriding justification can be shown.

III. Petitioner has made no showing of business necessity sufficient to justify the exclusion of pregnancy from its disability insurance program.

Since respondents and other *amici curiae* appearing on their behalf have given careful attention to disproving the justifications offered by petitioner for its policy, we will provide only some general comments regarding these justifications. Most simply, the argument made is that to cover pregnancy-related disabilities will be costly. We do not quarrel with that general contention, although we caution the Court that the precise extent of cost depends upon assumptions which must be analyzed carefully to assure

that sexual stereotypes are not employed.[16]

But it should be obvious that cost alone cannot be a defense to a discriminatory employment practice otherwise banned. Clearly, it would be much cheaper to pay some blacks less than all whites, or to use an example more closely related to this case, to forego testing a woman's physical ability for a job when it is known that most women are physically unable to perform it. The requirements for validating employment tests approved in *Allemarle Paper Co.* v. *Moody*, — U.S. —, 43 U.S.L. Wk. 4880 (June 25, 1975) are likely to be quite expensive, and the cost of employing less-qualified employees for lack of a suitable test is also high. Yet, the Court has not regarded expense as an excuse for using a test not proven to be job-related if discriminatory impact is shown.

[16] Two obvious examples of such stereotypes are the assumption that women will stay home even when they are no longer disabled and the concommitant assumption that the average period of pregnancy disability will be as long as fifteen weeks. For example, petitioner stated in its Motion for Reconsideration in the District Court (App. 165): "[B]ecause employees of [Liberty Mutual] can, in some situations make as much or more money by receiving disability income, it can be assumed that females on pregnancy leave of absence will remain home longer than normal • • • This is not to be critical, but human nature dictates that if the female can be paid for staying home, she will." The District Court responded to this claim with a perceptive insight into the sexual stereotype involved.

> "[A]s a trial judge who has seen hundreds of cases of soft tissue damage arising from the so-called 'whip lash' type of injuries which produce few observable objective symptoms the court sees no basis for assigning the tendency to malinger as a sex-related characteristic. If, as defendant suggests, the employee can make as much or more money on disability than at work be true, then the fault lies with the particular insurance plan and not with the female sex." (App. 184.)

Further, this Court has construed a statute analagous to Title VII, the Equal Pay Act of 1963 (29 U.S.C. § 206 (d)(1)), always to require the wages of the disadvantaged sex to be raised (*Corning Glass Works* v. *Brennan*, 417 U.S. 188, 207 (1974)), regardless of the costs involved. Similarly, the Court, in dealing with the requirement of showing a compelling interest in equal protection cases, has held that cost alone cannot constitute the requisite justification. (See, e.g., *Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969).) The Title VII analysis must be parallel in order to give full effect to Congress' purpose of ending employment policies based on impermissible factors.

Second, even if there are situations in which the cost of equality would be so great as to justify a facially-neutral policy with a completely disparate effect by gender, petitioner here would not be entitled to prevail on the basis of business necessity. No attempt was made in the District Court to demonstrate the actual cost of adding pregnancy-disability coverage to the income protection plan.[17] Moreover, petitioner did not arrive at the decision to exclude pregnancy-related disabilities from its income protection plan on the basis of actuarial information regarding the cost thereof. Rather, the reason for including almost all medically-confirmed disabilities except pregnancy [18] appears

[17] The excuse given was that no such statistics are available because no companies cover such disabilities. In fact, however, a large proportion of companies with disability insurance programs *do* cover pregnancy. See, for a list of major companies providing such coverage, U.S. Department of Labor, Bureau of Labor Statistics, "Digest of Health and Insurance Plans" 1971 Edition, Vol. II.

[18] The only medically-supervised relatively long-term disabilities not covered are those relating to war and those which are self-

to have been merely that it was believed to be one of many disadvantages visited on pregnant women which the company might be able to continue.[19]

Surely, the defense of business necessity in the Title VII context requires a consideration only of the reasons an employer actually instituted a program, not of the reasons it could have done so. To characterize as a business necessity a factor the company did not even consider in a businesslike way seems a contradiction in terms. Since Liberty Mutual has shown no considered necessity for the pregnancy exclusion, the demonstration in Parts I and II *supra* suffices to require affirming the court below.

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inflicted. (App. 99.) While petitioner seeks to characterize the former exclusion as relating primarily to men (Pet. Br. p. 19), presumably men engaged in combat would not be in the employ of the company when the disability began, or on "vacation or paid excused absence" (App. 100), and thus would not be eligible for the benefits. Rather, the exclusion must cover those, men or women, injured by acts of war while *not* in the armed forces, and is included, in all likelihood, because a large proportion of the work force could be affected at one time. It is impossible to fiscally plan for such a major but unknown catastrophe.

The self-inflicted injury exclusion also has a justification other than cost alone. For the company may legitimately wish to discourage its employees from injuring themselves, while there is little legitimate reason for discouraging women from bearing children.

[19] See the deposition of petitioner's manager of personnel services:

"Q. Does the income protection plan cover disability related to pregnancy?

"A. No.

"Q. Are there any other disabilities that it doesn't cover?

"A. Any disability that is not established by medical evidence.

"Q. Any other?

"A. I can't think of any.

"Q. Can you tell me why it doesn't apply to pregnancy?

"A. On advice of counsel." (App. 42-43.)

CONCLUSION

Petitioner engaged in activity which is a prima facie violation of § 703(a)(2) of Title VII, and presented no viable defense thereto. Therefore, the decision of the Court of Appeals must be affirmed.

Respectfully submitted,

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